

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOUIS SHURE	:	ORDER
	:	DTA NO. 819564
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1995.	:	

Petitioner, Louis Shure, 180 East End Avenue, New York, New York 10128, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1995.

On December 4, 2003, the Division of Taxation ("Division"), appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), moved for dismissal of petitioner's petition or, in the alternative, summary determination on the grounds that there were no material issues of fact and the undisputed facts mandated a finding in the Division's favor. Answering papers due by January 5, 2004 were not filed, and such date commenced the 90-day period for issuance of this determination. After due consideration of the Division's motion, the supporting affidavit of John E. Matthews, Esq., and attached exhibits, and all of the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion to dismiss or, in the alternative, motion for summary determination should be granted.

FINDINGS OF FACT

1. Petitioner, Louis Shure, filed his 1995 New York State Personal Income Tax Return on April 28, 2000, on which he allegedly requested a refund of an overpayment of taxes paid in the sum of \$8,064.00. The return has not been submitted by the Division on this motion.

2. By letter, dated May 12, 2000, the Division of Taxation denied petitioner's request, providing the following reason:

I have been asked to look into the problem with your 1995 request for refund.

. . . Section 687 of the New York State Tax Law does not allow this overpayment to be refunded. The deadline for filing for the refund or credit expired April 15, 2000,¹ three years from the date the return was due.

3. On or about May 10, 2003, petitioner filed a Request for a Conciliation Conference seeking to challenge the Division of Taxation's denial of his refund request. Petitioner's request for conference was denied by Conciliation Order, dated June 6, 2003. The Order stated that since the request for conference had not been filed within two years of the mailing of the statutory notice, it was late filed and the request for conference was denied.

4. On July 14, 2003, petitioner filed a petition with the Division of Tax Appeals contesting the dismissal of his request for a conciliation conference, stating that he never received a "statutory notice" and therefore his time to file a request was timely.

¹There was no explanation given why the 1995 income tax return would be due April 15, 1997.

5. The Division of Taxation mailed an answer to petitioner which denied the allegations in the petition and asserted that the burden of proof was on petitioner to show that the refund denial was erroneous or improper.

6. The instant motion to dismiss or for summary determination contains a supporting affidavit of John E. Matthews, Esq., sworn to November 26, 2003, in which he stated that petitioner's request for conciliation conference and petition were filed more than two years from the date of the denial letter, and therefore, the Division of Tax Appeals lacks jurisdiction to review the refund claim. Further, Mr. Matthews contended that there was no material issue of fact and that a determination should be issued in favor of the Division.

7. The Division of Taxation submitted no proof of mailing with respect to the denial letter dated May 12, 2000.

CONCLUSIONS OF LAW

A. Tax Law § 689(c) provides:

Petition for refund. --

A taxpayer may file a petition with the tax commission for the amounts asserted in a claim for refund if --

- (1) the taxpayer has filed a timely claim for refund with the tax commission,
- (2) the taxpayer has not previously filed with the tax commission a timely petition under subsection (b) for the same taxable year unless the petition under this subsection relates to a separate claim for credit or refund properly filed under subsection (f) of section six hundred eighty-seven, and
- (3) either (A) six months have expired since the claim was filed, or (B) the tax commission has *mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim* in whole or in part.

No petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance, unless prior to the expiration of such two year period it has been extended by written agreement between the taxpayer and the tax commission. If a taxpayer files a written waiver of the requirement that he be mailed a notice of

disallowance, the two year period prescribed by this subsection for filing a petition for refund shall begin on the date such waiver is filed. (Emphasis added.)

B. The Division of Taxation has not established that petitioner did not file a timely claim for refund. (Tax Law § 689[c][1].) The May 12, 2000 letter created several issues which have not been resolved and warrant a hearing. First, the letter refers to petitioner's "1995 request for refund." There is no explanation of this request and to which year it pertains. Second, the letter's reference to "April 15, 2000" as the deadline for the filing of a refund application is inexplicable and the source of further confusion.

The Division of Taxation also has not established that it mailed the May 12, 2000 denial letter to petitioner by certified or registered mail as required by Tax Law § 689(c)(3)(B). Therefore, the Division has not established both the fact and date of mailing of the notice to petitioner at his last known address and is not entitled to summary determination herein. (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991.)

D. The Division of Taxation's motion to dismiss and motion for summary determination are denied.

Dated: Troy, New York
January 22, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE